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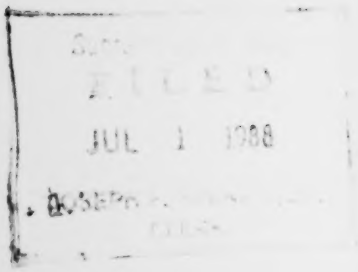

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1987

GO AIR, INC. **Petitioner,**

v.

ADMINISTRATOR, FEDERAL AVIATION ADMINISTRATION, and NATIONAL TRANSPORTATION SAFETY BOARD, **Respondents.**

PETITION FOR A WRIT OF CERTIORARI TO TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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July, 1988

QUESTIONS PRESENTED

1. Is it a violation of the Fifth Amendment right to due process for Congress to authorize the Administrator of the Federal Aviation Administration to issue emergency orders that are the equivalent of a judicial temporary restraining order, and which instantly shut down businesses, put pilots out of their jobs, yet fail to provide any hearing whatsoever where the use of that power may be challenged?

2. Is the failure of the Federal Aviation Administration to either publish its emergency policies in the Federal Register or promulgate them as rules through public notice and comment procedures a violation of the Administrative Procedure Act which requires dismissal?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

OPINIONS BELOW 1

JURISDICTION 1

STATUTES INVOLVED 2

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE WRIT 18

I. The FAA emergency power constitutes an executive branch TRO; failure to provide any hearing to challenge its use violates due process 18

II. FAA failure to either publish or promulgate its emergency policies violates the APA and requires dismissal 30

A. Failure to publish 30

B. Failure to promulgate 33

CONCLUSION 36

APPENDIX (Judgment of Court of Appeals; Opinion and Order of the National Transp. Safety Bd., etc.) .....a-1 to a-75

Certificate, Rule 28.1 Go Air, Inc., no subsidiaries, is owned by The Go Group Unlimited, in turn owned by Ronald J. Clark, and affiliated with Go Group's Go Leasing, Inc. and Royal American Airways, Inc. None is currently operating.

TABLE OF AUTHORITIES

Cases: Page

Aiken v. Obledo, 442 F.Supp. 628 (D.C. Calif. 1977) 34

Air East, Inc. v. NTSB, 512 F.2d 1227 (3rd Cir.), cert. denied 423 U.S. 863 (1975) 22

Am. Standard, Inc.. v. U.S., 602 F.2d 256 (U.S.Ct. of Claims 1979) 34

Appalachian Power Co. v. Train, 566 F.2d 451 (4th Cir. 1977) 32

Armstrong v. Manzo, 380 U.S. 545 (1965) 25

Environmental Defense Fund, Inc. v. Gorsuch, 713 F.2d 802 (D.C. Cir 1983) 35

Fuentes v. Shevin, 407 U.S. 67 (1971) ...23

Go Leasing, Inc. v. National Transp. Safety Bd., 800 F.2d 1514 (9th Cir. 1986) 5,8,29

Komjathy v. National Transp. Safety Bd., 832 F.2d 1294 (D.C. Cir. 1987), cert. denied ___ U.S. ___ (1988) (Sup. Ct. No. 87-1805) 29

Matthews v. Eldridge, 424 U.S. 319 (1976) 23

Morton v. Ruiz, 415 U.S. 199 (1974) 32

Nevada Airlines v. Bond, 622 F.2d 1017 (9th Cir. 1980) 20,21,24,26,29

Northern California Power Agency v. Morton, 396 F.Supp. 1187 (D.D.C. 1975), affirmed 539 F.2d 243 (D.C. Cir. 1976) 32

Pastrana v. United States, 746 F.2d 1447 (11th Cir. 1984) 34

Pharmaceutical Manufacturers Ass'n v. Finch, 307 F.Supp. 858 (D.C. Del. 1970) 35

Phillips Petroleum Co. v. Department of Energy, 449 F.Supp. 760 (D.Del.), affirmed 596 F.2d 1029 (Emer.Ct.App. 1978) 35

South Pacific Island Airways, NTSB Order EA-2526, May 26, 1987, SE-8089 20

United States v. Harper, 335 F. Supp. 904 (D. Mass. 1972) 23

Constitution and Statutes:

U.S. Const. Amend V (Due Process Clause) 18,23,29

Administrative Procedure Act, 5 U.S.C. §§ 551-559, 702-706 (1982):

§ 551(4) 33

§ 552(a)(1) 31,33,35

§ 553 33,34,35

§ 706 35

Federal Aviation Act of 1958, as amended, 49 U.S.C. app. §§ 1301-1552 (1982):

§ 1429(a) (§ 609) 1,2,19,30

§ 1485 19

§ 1486 2,25

§ 1487 27,28

Regulations:

Civil Aeronautics Regulations:

14 C.F.R. § 408.25 (1952) 29,36

Federal Aviation Regulations, 14 C.F.R. Parts 1-199 (1988):

§ 13.19 30

§ 13.25 27

Miscellaneous:

Fed. R. Civ. P. 65(b) 22,27

Compliance and Enforcement Program, FAA Order 2150.3 (1980) 31

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1987

GO AIR, INC., Petitioner,

v.

ADMINISTRATOR, FEDERAL AVIATION ADMINISTRATION, and NATIONAL TRANSPORTATION SAFETY BOARD, Respondents.

PETITION FOR A WRIT OF CERTIORARI TO TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner Go Air, Inc. respectfully prays that a writ of certiorari issue to review the judgment (without opinion) of the United States Court of Appeals for the District of Columbia Circuit, entered in this proceedings March 7, 1988; Order Extending Time to File Petition For Writ of Certiorari to and including July 5, 1988, entered by this Court on May 6, 1988.

OPINIONS BELOW

The judgment of the Court of Appeals for the District of Columbia Circuit is not reported, and is reprinted in the appendix. (a-41). The opinion and order of tne National Transportation Safety Board (NTSB) has not yet been reported. It is reprinted in the appendix. (a-29)

JURISDICTION

The Federal Aviation Administration (FAA), on May 2, 1985, initiated an enforcement action against petitioner, under 49 U.S.C. app. § 1429(a), by ordering

on an emergency basis the revocation of its FAA Repair Station operating certificate. The company appealed to the NTSB, under § 1429(a), hearing was held by an administrative law judge on May 5, 1986 at which petitioner was unable to contest the charges, and his initial decision upholding the revocation was affirmed by NTSB Order No. EA-2431, Nov. 7, 1986, SE-6767. Go Air, Inc. then petitioned the Court of Appeals for the District of Columbia Circuit for review, under 49 U.S.C. § 1486. That court entered judgment affirming the NTSB order on March 7, 1988.

The jurisdiction of this Court to review the judgment of the District of Columbia Circuit is invoked under 28 U.S.C. § 1254(1) and 49 U.S.C. § 1486(f).

STATUTES INVOLVED

The statutes and regulations directly relevant to the issues are here listed, with their text set forth in the appendix:

Administrative Procedure Act, 5 U.S.C. §§ 551-559, 702-706 (1982): §§ 551(4), 552(a)(1), 553, 558, 706;

Federal Aviation Act of 1958, as amended, 49 U.S.C. app. §§ 1301-1552 (1982): §§ 1429(a), 1485, 1486, 1487.

Federal Aviation Regulations (FARs), 14 C.F.R. Parts 1-199 (1988): §§ 13.19, 13.25.

STATEMENT OF THE CASE

On May 3, 1985 FAA officials served an emergency order which combined the cases and revoked the operating certificates of three affiliated Tucson companies: petitioner Go Air, Inc., holder of an FAA Part 145 Repair Station Certificate, Go Leasing, Inc., holder of a Part 125 private, large-aircraft charter certi- ficate, and Royal American Airways, Inc., holder of a Part 121 air carrier certificate. All were owned or controlled by The Go Group Unlimited, a holding company, owned by Ronald J. Clark.

Revocation was ordered on grounds that

the companies, because of the multiplicity of maintenance and bookkeeping violations charged, failed to "exercise the degree of care, judgment and responsibility required of the holder" of their respective certificates, which demonstrated a lack of qualifications. (a-25)

Clark, mainly because its charges were less extensive and it was then providing the only cash flow ($750k/mo.), elected to take just Go Leasing to the accelerated hearing afforded emergency cases. Royal American had been temporarily shut down three weeks earlier. Although Go Air did the others' maintenance, there was no requirement they use a licensed repair station: its mechanics could have gone on Go Leasing's payroll, or worked independently. The urgency was to save Go Leasing with its contracts it could still perform.

At the June 1985 Tucson hearing the Administrative Law Judge (ALJ) found its

revocation to be unjustified and reduced it to a ten-month suspension.[1] Royal American and Go Air came to trial December 9, 1985 in Los Angeles, but when the ALJ saw Royal American could not be finished that week, he put it over to February 1986 in Denver--where he lived. With cashflow gone, Clark couldn't afford the enormous cost of transportation and lodging for lawyers and witnesses a thousand miles from Tucson.[2] So a certificate conservatively worth $500,000 was lost. Despite strong objection, the ALJ later set Go Air for May 1986 in Phoenix,[3] but lodging made that prohibitive too, so no defense was presented.

It is critical to note that at none of

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[1] See, Go Leasing, Inc. v. NTSB, 800 F.2d 1514 (9th Cir. 1986).

[2] Los Angeles was arranged because Clark's lawyer and by this time certain key witnesses lived there; Clark had a home there in which witnesses could be lodged. And it was fair to expect the cases would be tried to their conclusion there.

[3] At 120 miles, too long a commute.

these hearings could the government's use of the emergency power, which overrides an otherwise automatic statutory stay of any suspension or revocation, be challenged. The NTSB will not entertain the issue, and the FA Act provides no other recourse.

As a result of the emergency revocations, **143 persons** (about 70 of them at Go Air) lost their jobs, all but twenty immediately, those a few months later. When Clark shut down the next morning, three Rock bands and hundreds of Club Med members were left stranded.[4] Go Leasing had $3 million of in-house contracts, not including Club Med, and could expect another $2 million to pop up later in the year.[5]

The Go Group operated from its $4 mil-

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[4] May 3 was a Friday. Many lawyers believe FAA officials serve emergency orders late on Fridays to make it difficult to get a TRO from a federal judge.

[5] Too often lost sight of in these cases is the impact on banks, creditors, leasing companies, stockholders . . .

lion dollar base at Tucson International Airport with a Fort Lauderdale, Fla., satellite. It owned twenty Vickers Viscount four-engine turbo-prop aircraft of which ten were being operated[6]. Go Leasing chartered seven of these, which were in executive (arm-chair) configuration, to Rock bands and other entertainers such as Lawrence Welk, who would use them on concert tours, often six months or more. Royal American had flown some scheduled routes for Air-Florida, but mostly chartered to Caribbean casinos and resort hotels. Mr. Clark and Go Air were both in Chapter 11 in 1985 due to a failed attempt to start a L.A.-Las Vegas discount airline. But with Go Leasing's growing cash flow he was well on his way towards reorganization.

How was it that FAA officials took such

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[6] The Viscount was a popular British '50s and '60s airliner. The executive versions came from major corporations.

a drastic step they well knew would destroy Clark's operations? It got started when Go Leasing's principal operating inspector (POI) objected to a contract to fly Club Med members from Miami to its Dominican Republic resort at Punta Cana.[7] Shortly thereafter, FAA lawyers--one of whom admitted at the hearing that reasonable men could disagree about whether the contract did violate the rules--invited the company to seek an exemption--which, if granted, would have made it all legal. Clark promptly applied to these same officials, who then ignored it, nor did they ever tell him they would bring an action if he didn't

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[7] The claim was that Go Leasing was indirectly "holding out" through Club Med, so big, membership fee so low ($30), that it was in effect selling air transportation. See Go Leasing, 800 F.2d at 1524-26. This is hard to accept since the airstrip at Punta Cana was Club Med's own, nothing else was there, the nearest airport was four hours away over bad roads, and it cost a $700+ vacation package to go there, of which air travel was but a minor part.

cease and desist;[8] two weeks later they dispatched a special inspection team to audit the entire Go Group operation.

For five full weeks, February 20 to March 27, eight inspectors were on the premises going through files and records on personnel and airplanes, much of it years old. They drew up a list of claimed discrepancies. Five weeks after March 27th, when they finished, using that list for his claimed safety violations, FAA regional counsel DeWitte Lawson, on May 2nd, issued the "emergency" order on grounds the companies were "immediate" threats to air safety. (a-26)

Salient facts In the 15 years Mr. Clark had been carrying dozens of entertainment groups and thousands of passengers in his

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[8] Although there were minor problems which could have been solved, or likely given exemptions, Clark, were he warned, could have switched the service to Royal American's air carrier certificate, which was clearly lawful.

Viscounts he had never had an accident, not even an incident like an engine fire; his multitudinous aviation operations, which at one time included a world-wide DC-7 freight operation, and an executive jet service, had never even had a violation of record. No complaint about any operation had come from the public before the emergency order. Club Med was most happy with the service.

None of the charges involved false entries, or pilots flying when they had not had their required six-month check ride, the sort that usually underpin immediate safety concerns. The worst sounding were those that claimed Royal American had operated two aircraft with several appliances (e.g., a flap motor) that had not been overhauled within the time required, allegedly making them unairworthy for a thousand hours of previous flight. This was a phony issue. All these appliances had been bought from United Air Lines' surplus stock

of spares from its retired Viscount fleet. The real claim was that the UAL tags on these parts which certified overhaul were not sufficient evidence of that, although the exact same tags were accepted by UAL's FAA inspectors. United destroys overhaul paper-work after two years, but the tag continues to serve as proof.

The principal maintenance inspectors for Royal American[9] **had been accepting these tags as lawful evidence of overhaul for at least four years**. Moreover, by the time of the emergency order, Royal American was shut down and the very two aircraft to which these charges applied had, with the approval of the principal inspectors in Phoenix, been transferred to Go Leasing's certificate where these same overhaul rules did not apply so that the aircraft were

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[9] All operating certificates have named inspectors--operations, maintenance, etc.--assigned to them. The Go Group's operated out of Phoenix.

perfectly legal. Vague claims about lack of management ignored the fact that the Go Group's had been specifically approved by its principal inspectors; at the time of the special inspection, Clark had already added a top manager to the repair station to help with the physical reorganization of it shop and huge parts supply; that Clark had shut down Royal American, when two key personnel left in order to concentrate management on Go Leasing. In other words, the criticism, even if valid, at the time of the emergency was weeks out of date.

Anyone reading the emergency order would agree that the operations sounded so bad they should have been shut down. They would also agree that the principal maintenance and operations inspectors obviously were incompetent and should have been fired, demoted or transferred. In fact, the principal maintenance inspector and assistant were promoted, operations untouched.

The Go Group was probably one of the most surveilled operations in the country, with inspectors in and out almost weekly. During the pendency of a short-lived suit in federal district court (dismissed for lack of jurisdiction), discovery produced hundreds of documents, especially surveillance reports for the preceding year, 1984. Of these, 97.6% were "satisfactory." Those unsatisfactory (there are only the two ratings), were usually for a minor maintenance problem, always corrected by the next report.

Three retired FAA regional counsel agreed with this attorney that a team of inspectors can go into <u>any</u> operation, the bigger, the easier, and find a multitude of seeming technical violations. The 76,000 of Eastern in recent times is an example. (FAA doesn't shut down large carriers, but lets them pay civil money fines.)

During any special inspection the team

is directed to tell the operator and its principal inspectors[10] if it finds any problem that reflects on air safety, so, if necessary, it can be immediately remedied. During the five-week inspection, when the team inspectors were of course aware Go Leasing was carrying hundreds of Club Med members every week, they did this just twice:[11] (1) they found that a single generator (of four) on one Viscount had been calibrated by bench-test equipment itself several months overdue on its own calibration. At a cost near $10,000, Mr. Clark immediately grounded the aircraft in Freeport, Bahamas, chartered another airplane to return the passengers the fifty miles or so to Florida, flew another generator out, then brought the plane back.

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[10] Who do not participate, since one purpose is to show them where they may have been lax.

[11] And in neither instance did they insist it be done right away.

(2) The team discovered that two recently hired flight attendants, during their emergency training in the Viscount, due to a regulatory misunderstanding by the chief flight attendant, and because the two women had done so with their previous carrier, did not actually activate the emergency evacuation chute as required. The next morning at Ft. Lauderdale they did so. Problem remedied.

That these were the only two discrepancies so treated by the team during the five weeks undercuts any claim of an immediate threat to air safety as, of course, does the five-week delay after the inspection.

Also relevant is the fact that the FAA officials who initiated the special inspection and this case deliberately violated their own formal requirement that at the end of such the operator be allowed to rebut, mitigate or correct any deficiencies found. Although specifically promised,

Clark was never allowed to see it.

There is strong reason to believe that the motive behind the use of the emergency power was retribution. In 1978 these same FAA officials had conducted a three-month investigation into Clark's Viscount operations. Even with an FAA lawyer from another region as a kind of agreed-upon referee on claimed civil penalties, out of more than a hundred charges involving operations, maintenance and claimed subterfuge in violation of Civil Aeronautics Board (CAB) air charter regulations, not a single one was proved convincing. Two months later regional counsel Lawson, after seeking more than $100,000, the same who signed the emergency order here, suggested a compromise civil penalty of $2,000. Clark, who'd spent $85,000 in legal fees defending, declined. Lawson, who could have pursued the matter through a United States Attorney in district court, took no further

action. In the Go Leasing hearing, Clark testified under oath that when he called Lawson the evening of the day the emergency order was served, among other things, Lawson said, "I've got you this time."

It is this writer's opinion that at least 80% of the long list of charges were invalid or utterly deminimus. Mr. Lawson, himself, at the start of the Royal American hearing voluntarily dropped a substantial number. It is fact that the Go Group's principal inspectors did not know that top region officials were going to revoke the three companies, nor were they consulted. The inspection team leader was heard by this writer to say that he'd had no idea revocation was going to be used. In other words, this drastic action was conceived only by top officials unsupported by those who conducted the special inspection or the inspectors responsible for and familiar with the certificate holders.

None of the charges constituted any real threat to air safety. In the two instances noted, where the team felt management should be alerted, remedial action was instantaneous. Of those that may have been valid, any and all could have been corrected overnight, or the aircraft voluntarily grounded, had management been told what the discrepancies were. It is obvious this was not done because it would have left no basis for the claim five weeks later that there was an "immediate" threat to air safety.

REASONS FOR GRANTING THE WRIT

I. The FAA emergency power constitutes an executive branch TRO; failure to provide any hearing to challenge its use violates the Fifth Amendment right to due process.

Petitioner's statement of the case shows clearly that in any emergency, where safety violations form the basis for revoking an

operating certificate[12] (rather than a disabling failure to meet some specific regulatory requirement laid down for holding it) the issue of whether the operator is a threat to air safety is distinctly separate from the issue of guilt. Holding a hearing on the air-safety impact issue, necessary because the emergency power is draconian in the extreme and open to abuse, is entirely feasible. Yet Congress failed to provide any. That failure, on its face, violates rudimentary concepts of due process.

FAA suspension and revocation of certificates is ordered pursuant to the FA Act, § 609, 49 U.S.C. app. § 1429(a).[13] That order may be appealed to the NTSB (for a hearing

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[12] These cases are rarely brought for any other reason.

[13] FAA also relies on section 1005, 49 U.S.C. § 1485, which deals with emergency orders. It is not clear this is needed: the act makes no cross-reference, and certificate action is authorized only by section 609, but the question is of no moment since it doesn't change the issue.

de novo). Id. The appeal carries an automatic stay of the order

> unless the [Administrator] advises the National Transportation Safety Board that an emergency exists and safety in air commerce or air transportation requires the immediate effectiveness of his order, in which event the order shall remain effective and the National Transportation Safety Board shall finally dispose of the appeal within sixty days after being so advised by the [Administrator].

Id. But here is the problem:

> SPIA also argues that the evidence did not justify the grounding of its aircraft, and the Board should therefore terminate the emergency suspension. As the Administrator points out, the Board has held repeatedly that the Administrator's determination that an emergency exists is not subject to Board review.

South Pacific Island Airways, NTSB Order EA-2526 at 3, n. 4, May 26, 1987, SE-8089 [emphasis added]; see also, Nevada Airlines, Inc. v. Bond, 622 F. 2d 1017, 1020 n. 4 (9th Cir. 1980). Obviously, this leaves the FA Act with a serious void.

It was two decades before an appeals court noted it, and recognized that viola-

tion guilt is distinctly separate from the issue of threat to air safety:

> Our initial concern is with the reviewability of the emergency revocation order. We distinguish here the Administrator's determination that an emergency warranted immediate effectiveness of the order from his underlying substantive determination that revocation was warranted. Under section 609(a) of the Federal Aviation Act . . ., the latter determination may be reviewed by petition to this court after resolution of the administrative appeal pending before the NTSB. Whether the former determination is reviewable now is an issue of first impression.
>
> . . . .
>
> We are persuaded . . . that Nevada Airline's claim for relief is cognizable at this time,[14] even though administrative remedies remain available to challenge the underlying revocation order.

Nevada Airlines, supra, 622 F.2d at 1019. To this point, challenges always arose as part of the review of the NTSB decision. The due process violation urged was usually lack of notice, during some extended period

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[14] The airline immediately sought an injunction against the emergency order in district court; the judge dismissed for lack of subject matter jurisdiction, thus the appeal. 622 F.2d at 1018.

of time after an inspection, that FAA planned to use the emergency power.[15] See Air East, Inc. v. NTSB, 512 F.2d 1227 (3rd. Cir.), cert. denied, 423 U.S. 863 (1975).

The lack of notice issue is off the mark. The real issue is right to an immediate hearing in which to challenge the emergency order, just as one would have with a temporary restraining order (TRO). See Fed. R. Civ. P. 65(b). It is the essence of a TRO that it can be granted, if necessary, without notice to the other party. But that is ameliorated by a prompt hearing, usually within ten days. Id.[16]

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[15] Petitioner has noted the delay in its own case, but only to show there was a legitimate question whether its operation was truly a threat to air safety, and it should have been afforded an immediate hearing to challenge the emergency.

[16] Nor does any FAA official have to state under oath the compelling reasons for such drastic action--as is required by Rule 65(b)--which would give the operator or pilot something to challenge. All that is provided is the unsworn and bare statement: "Based upon the foregoing circumstances, the Administrator . . . has determined that

Wyzanski, J., the eminent jurist, was quick to see this and said that a section 609 emergency order "might be regarded as analogous to a judicial temporary restraining order issued ex parte in an emergency." United States v. Harper, 335 F.Supp. 904, 906 (D. Mass. 1972). He explained:

> "The right of a person to be heard before he is deprived of his property by governmental action is the most elementary, fundamental, and comprehensive of the rights guaranteed by the due process clause of the Fifth Amendment. [Citing cases] . . . Such a guarantee may be validly limited only under the most compelling circumstances and then generally only for the briefest of periods. . . .

Id. at 906-07. See also Fuentes v. Shevin, 407 U.S. 67, 80 (1971) (parties whose rights are to be affected are entitled to be heard); Matthews v. Eldridge, 424 U.S. 319 (1976).

The Ninth Circuit in Nevada Airlines

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safety in air commerce and the public interest require the immediate revocation, on an emergency basis, of . . . Repair Station Certificate No. 434-1." (a-26)

failed to recognize the order as an executive-branch TRO, but did note its unfairness. It explained that

> [a]lthough the administrative appeal is expedited in these emergency situations, the net effect is suspension without prior notice and hearing for a period of up to 60 days. . . . The emergency determination would deprive the certificate holder of a significant property interest and affects substantial rights that might be lost if review is denied or delayed.
>
> This determination could not be insulated from prompt judicial review without raising serious due process concerns.

622 F.2d at 1019-20 (footnote omitted). **The clear holding here is that 60 days violates due process**, it is far too long, and virtually assures that any aviation business will be destroyed.

The problem with Nevada Airlines, however, is that instead of simply declaring section 609 unconstitutional, the Ninth Court tried to patch together a solution out of the FA Act. It determined that Congress had solved it when it gave the

courts of appeals exclusive jurisdiction over FAA orders in section 1006, 49 U.S.C. app. 1486(a). In our view, this is without merit. There is no evidence Congress had in mind the emergency hearing problem when it drafted section 1006. In fact, any reading of that section indicates that the orders it contemplates result from evidentiary and adjudicated proceedings. This is precisely what an emergency order is not. It is an arbitrary ex parte order signed by a single FAA functionary.

The Nevada court's confused approach may be shown by the comment: "We recognize the difficulty facing a petitioner in marshalling evidence at this stage, but we find no showing that the Administrator's finding of an emergency was unreasonable." 622 F.2d at 1021. An appeals court is an eminently ill-equipped place to do that. The opportunity to be heard must be granted "in a meaningful manner." Armstrong v. Manzo, 380 U.S.

545, 552 (1965). The only way that that can be done is with the full assortment of federal discovery procedures, along with a hearing in which FAA officials can be subpoenaed and cross-examined. Which means district court. "Where we are given no concrete information casting doubt on the authenticity or gravity of any of the Administrator's charges, we shall not interfere with his determination that summary action was required." 622 F.2d at 1021. Absent a explicit statutory provision, where would the practitioner learn how to advance his client's rights, other than by reading Nevada Airlines?

What the Ninth Court was doing here, in our view, was legislating a solution for the sloppy job Congress did.[17] How would

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[17] No legislative history indicates the FA Act was considered by either judiciary committee. It is common knowledge its passage was hurried because of the 1956 Grand Canyon UAL-TWA collision, followed by three military jet fighters ramming into

its determination be binding in the Fourth Circuit, Eighth? Moreover, if its solution is so obvious, why had no one else seen it in the preceding twenty-two years?

Interestingly--and overlooked--was the fact that Congress provided an additional path to follow in an emergency which, when contrasted with sections 609 and 1005, highlights their unconstitutionality. It has given the FAA abundant authority to seek remedies, specifically including injunctions, for any enforcement problem, through United States Attorneys and District Court. FA Act § 1007, 49 U.S.C. app. 1487;[18] see 14 C.F.R. § 13.25. Using this procedure would of course bring into play the protections afforded by Rule 65(b). But given the choice between

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airliners, one on the very eve of hearings.

[18] Given the express authority here for FAA to go to district court, one would think Congress made it plain that that court has subject matter jurisdiction over protective orders against FAA overreaching.

dictating a form letter to his secretary which only needs his signature and cannot be contested, and selling the need for an emergency order which will destroy a business, first to a United States Attorney, then to a federal judge, with detailed affidavits supporting the matter, which can be challenged in a prompt hearing, it is not difficult to see which route FAA regional counsel will take.

Almost all these cases involve weeks of preparation. It would be rare indeed when the agency would have to get a district judge out of bed. And it should be noted, were the section 609 emergency power declared unconstitutional, FAA's power to seek a remedy is in no way crippled until Congress should act: it would simply be forced to use the section 1007 district court procedure, where the right of a prompt hearing would be assured.

The District of Columbia Circuit in the

instant case, without elaboration, chose to follow Go Leasing, Inc. v. NTSB, 800 F.2d 1514 (9th Cir. 1986).[19] (a-42). Since that relies on Nevada Airlines, id. at 1523-24, we ask, in effect, review of the latter. The Ninth Court properly recognized the dichotomy in issues--guilt vs. threat--and lack of a prompt hearing, but its solution was constitutionally inappropriate.

The failure to provide a prompt and meaningful hearing in which to challenge FAA use of its emergency power denied petitioner Go Air, Inc. its Fifth Amendment right to due process.[20]

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[19] It also cited Komjathy v. NTSB, 832 F.2d 1294 (D.C. Cir.), cert. denied, ____ U.S. ____ (1988) (Sup. Ct. No. 87-1805), but it is not relevant, as no emergency was involved.

[20] Compare the Civil Aeronautics Administration (CAA) emergency rule which provided it "shall enter upon a hearing which shall be disposed of as speedily as possible . . ." 14 C.F.R. § 408.25 (1952) (a-66). Since the "immediate" threat criteria is contained in this rule, it is fair to assume that that could be made an issue in such a hearing.

II. FAA failure to either publish or promulgate its emergency policies violates the Administrative Procedure Act and requires dismissal.

A. Failure to publish In its rules, see FAR § 13.19(d), 14 C.F.R. § 13.19(d), FAA merely adverts to the emergency power by reciting the language of section 609, 49 U.S.C. § 1429(a). The policy which implements it is found only in an agency manual:

> g. Emergency orders of suspension or revocation.
>
> (1) Basis for issuance.
>
> (a) Emergency suspension or revocation of a certificate should be used only as an emergency safety measure and, thus, to provide immediate protection to the public. Generally, the longer the interval between the date of the incident and the date of the action, the more difficult it will be for the FAA to claim that an emergency exists. Therefore, emergency actions should be taken as soon as possible after the date of the incident.
>
> (b) An emergency suspension or revocation should never be used for punitive reasons. When receiving a recommendation for emergency action, counsel should ensure that there is sufficient evidence of an emergency requiring immediate effectiveness of an order of suspension or revocation. . . .

Compliance & Enforcement Program, FAA Order 2150.3, ¶ 1203.g. at p. 173 [emphasis added] [1980 Handbook].

The APA provides that each agency shall "publish in the Federal Register for the guidance of the public-- . . . [inter alia] [1] rules of procedure . . . [2] statements of general policy or [3] interpretations of general applicability formulated and adopted by the agency . . ." 5 U.S.C. § 552(a)(1). Unless the person has actual and timely notice, "a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published. . . ." Id. This is a legislative exclusionary rule, the only remedy should an agency fail to publish.

Careful inspection of the Federal Register reveals the emergency policy has never been published since FAA's creation in 1958. Thus the only issue is whether it

meets one or more of the categories noted. It arguably meets all three, but certainly is both a [2] and a [3]. Publication in an agency manual is not sufficient to meet APA requirements. Morton v. Ruiz, 415 U.S. 199 (1974). "The statute [5 U.S.C. § 552(a)(1)] clearly provides that no administrative action taken pursuant to unpublished procedures can be allowed to stand against a person adversely affected thereby." Northern California Power Agency v. Morton, 396 F.Supp. 1187, 1191 (D.D.C. 1975), affirmed 539 F.2d 243 (D.C. Cir. 1976). "Any agency regulation that so directly affects preexisting legal rights or obligations . . . indeed, that is 'of such a nature that knowledge of it is needed to keep the outside interests informed of the agency's requirements in respect of any subject within its competence,' is within the publication requirement." Appalachian Power Co. v. Train, 566 F.2d 451, 455 (4th

Cir. 1977). Unless determined that the emergency policy is not a [1], [2] or [3] category, FAA's failure to publish requires dismissal. 5 U.S.C. § 552(a)(1).

B. Failure to promulgate. The emergency policy constitutes a "rule" as defined by the APA: "rule" means the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency . . ." 5 U.S.C. § 551(4). The basic question, however, is whether or not a "rule" is "substantive" within the meaning of id. § 553(d) ("The required publication of a substantive rule shall be made . . ."). If so, it must be adopted pursuant to formal procedures which require, inter alia, notice of proposed rulemaking published in the Federal Register, with a statement of basis and

purpose (NPRM), opportunity for public comment, and publication of the rule as finally adopted. Id. § 553(b).

It is clearly substantive: it affects a property right. See Pastrana v. United States, 746 F.2d 1447 (11th Cir. 1984). Search of the Federal Register since 1958 reveals no such NPRM. "The reviewing court shall--hold unlawful and set aside agency action . . . found to be-- . . . not in accordance with law." Aiken v. Obledo, 442 F.Supp. 628, 650 (D.C. Calif. 1977); see 5 U.S.C. § 706(2)(A). "The purpose of requiring a statement of the basis and purpose is to enable courts, which have the duty to exercise review, to be aware of the legal and factual framework underlying the agency's action." Am. Standard, Inc. v. U.S., 602 F.2d 256, 269 (U.S.Ct. of Claims 1979).

Section 553(b), was meant to provide an opportunity for public participation in the rule making process when that process re-

sults in the promulgation of rules or regulations of substantial impact. Pharmaceutical Mfrs. Assoc. v. Finch, 307 F.Supp. 858 (D. Del. 1970); Phillips Petroleum Co. v. Dep't of Energy, 449 F.Supp. 760 (D. Del.), affirmed 596 F.2d 1029 (Emer.Ct.App. 1978). "Any claim of exemption from APA rulemaking requirements 'will be narrowly construed and only reluctantly countenanced.' [Citing cases]" Environmental Defense Fund, Inc. v. Gorsuch, 713 F.2d 802, 816 (D.C. Cir. 1983). Unless the emergency policy is found not to be substantive in nature, FAA failure to promulgate it requires dismissal. 5 U.S.C. §§ 552(a)(1), 553 and 706. It is difficult to see how FAA could so claim, or that the policy should at least be published, since the CAA, from which it metamorphosed, as noted above, had an emergency rule no doubt the origin of FAA's handbook policy:

"Under section 609 of the act, in

> cases of emergency . . . [the CAA Administrator may suspend a certificate if] the condition or conduct of a certificate holder is such as to indicate immediate danger of injury to person or damage to property, and the immediate suspension of the certificate might reasonably be expected to avert such injury or damage . . .

14 C.F.R. § 408.25 (1952) (a-66). Even assuming the worst case, that there might have been a threat to air safety between February 20 and March 27, 1985, what did that have to do with May 2nd? Was not petitioner entitled to a formal due process hearing in which to determine that? And a formal rule on which to base that challenge?

CONCLUSION

For these various reasons, this petition for certiorari should be granted.

Respectfully submitted,

LAWRENCE B. SMITH
3938 E. Grant Rd., #191
Tucson AZ 85712
602/326-0283
Counsel for Petitioner

July 1988

APPENDIX

TABLE OF CONTENTS

	Page
FAA Order of Suspension	a-1
NTSB Opinion and Order	a-29
Dist. of Col. Circuit Judgment	a-41
Supreme Court Order extending time ...	a-42
U.S. Const. Amend V	a-43
5 U.S.C. § 551(4)	a-44
§ 552(a)(1)	a-45
§ 553	a-47
§ 706	a-50
49 U.S.C. app.	
§ 1429(a)	a-52
§ 1485	a-56
§ 1486	a-60
§ 1487	a-64
14 C.F.R. § 408.25 (1952)	a-66
14 C.F.R. § 13.19	a-69
§ 13.25	a-74

US Department of Transportation
Federal Aviation Administration
Western-Pacific Region
Los Angeles, California

Case No. 85WP070100
Royal American Airways, Inc.

Case No. 85WP070099
Go Leasing, Inc.

Case No. 85WP070098
Go Air, Inc.

Case No. 85WP070044
Go Leasing, Inc.

May 2, 1985

To: Mr. Ronald J. Clark, President
ROYAL AMERICAN AIRWAYS, INC.
GO LEASING, INC.
GO AIR, INC.
100 East Valencia
Tucson International Airport
Tucson, Arizona 85706

EMERGENCY ORDER OF REVOCATION

It has been determined by the Administrator of the Federal Aviation Administration, acting by and through his Regional Counsel, that:

I.

1. Royal American Airways, Inc., (RAMA) is, and at all times mentioned herein was, the

holder of Air Carrier Operating Certificate No. ASW-61 and is thereby authorized to engage in air transportation under the supplemental rules of Part 121 of the Federal Aviation Regulations (FAR's) utilizing Viscount, model 700 aircraft.

2. Go Leasing, Inc. (Go Inc.) is, and at all time mentioned herein was, the holder of Operating Certificate No. WE-34-1 and is thereby authorized to conduct commercial operations under Part 125 of the FAR's utilizing Viscount, model 700 aircraft.

3. Go Air, Inc. (Go Air) is, and at all times mentioned herein was, the holder of Repair Station Certificate No. 434-1 and is thereby authorized to perform maintenance on aircraft components in accordance with Part 145 of the FAR's and the ratings of its certificate.

4. Commencing on or about February 20, 1985, and until on or about March 27, 1985,

the FAA conducted an Operational and Airworthiness inspection of RAMA, Go Inc. and Go Air. Said inspection disclosed facts which include the following:

a. Ronald J. Clark is the president of RAMA, Go Inc. and Go Air and the Director of Operations for RAMA and Go Inc.

b. The principal office for all three organizations is the same address in Tucson, Arizona.

c. The position of Director of Maintenance for all three organizations is held by the same person.

d. The position of Chief Inspector for all three organization is held by the same person.

e. The Chief Pilot for RAMA and Go Inc. is the same person.

f. RAMA does not have a full time General Manager as required by FAR 121.59.

g. RAMA does not have a full time Director of Operations as required by FAR 121.59.

h. RAMA does not have a full time Director of Maintenance as required by FAR 121.59.

i. RAMA does not have a full time Chief Pilot as required by FAR 121.59.

j. RAMA does not have a full time Chief Inspector as required by FAR 121.59

k. As a result, RAMA does not have enough qualified management personnel to provide the highest degree of safety in its 121 operations as required by FAR 121.59.

l. Go Leasing does not have enough management personnel, including the Director of Operations as to assure that its operations are conducted in accordance with requirements of Part 125 operations as required by FAR 125.25.

m. Pilot records, flight records, training records, flight and dispatch releases for RAMA and Go Inc. are maintained in the same location (room).

n. RAMA and Go Inc. conduct operations using a total of sixteen pilots. Eight pilots engage in flight for both RAMA and Go Inc.

o. RAMA and Go Inc. conduct operations using a total of nine flight attendants. Seven flight attendants are used on both RAMA and Go Inc. flights.

p. The functioning, activities, personnel, officers and management of RAMA and Go Inc. are so joined, intermixed and indistinguishable as to constitute a single FAR Part 121 air carrier operation.

* * * *

* * * *

1. Go Air, Inc. maintained or altered the following instruments and radios and approved them for return to service.

a. VHF Transmitter, Part Number TA-20A-1, Serial Number 61 on 10-29-84. (Installed No. 2 position, N200RC).

b. VOR Receiver, Part Number 51R3, Serial Number 5000 on 10-29-84. (Installed No. 1 position, N200RC).

c. Marker Beacon Receiver, Part Number MN61B, Serial Number 1-824 on 10-25-84. (Installed N200RC).

d. Fuel Quantity Indication, Part Number 300-1N-135, Serial Number 31 on 10-25-84. (Installed, unknown).

e. Marker Beacon Receiver, Part Number MN-61B, Serial Number 1-544, 10-25-84. (Installed, N24V, 10-31-84).

2. Go Air, Inc. was not rated under its Part 145 certificate to maintain or alter the instruments or radios listed in paragraph 1 above.

3. The instruments or radios listed in paragraph 1 a, b and c above were installed and utilized on an aircraft operated by Go Leasing, Inc. under its Part 125 operations specifications. The instrument listed in paragraph 1e above was installed and utilized on an aircraft operated by RAMA under its Part 121 operations specifications.

4. The maintenance or alteration performed by Go Air, Inc. did not comply with RAMA's Part 121 continuous airworthiness program or Go Leasing, Inc.'s approved inspection program.

5. By reason of the matters alleged in paragraph 1 thru 4 above, Go Air, Inc. violated Sections 145.2(a) and (b) of the Federal Aviation Regulations.

6. By reason of the matters alleged in paragraphs 1 and 2 above, Go Air, Inc. violated Section 145.53 of the Federal Aviation Regulations.

7. The airworthiness inspection conducted by the FAA described in paragraph I.4 above revealed the following deficiencies in the Go Air, Inc. facilities equipment and materials:

a. Stock room-

(1) The stock room area was open to dirt and dust;

(2) Numerous parts were not properly protected;

(3) The parts were not segregated as to serviceable versus unserviceable parts;

(4) Parts were not properly tagged; and

(5) Many parts exceeded shelf life.

b. Hanger area-

(1) Various parts and major components were stored in the hanger area with no means of determining their serviceability. Included among these are nose and main landing gear, wheels and tires, flap sections, flight control assemblies, landing gears, propellers,

aircraft batteries and ground equipment batteries;

c. Accessory Shops-

(1) Parts were scattered throughout the shop and bench stock parts were mixed with no means of determining serviceability of parts;

(2) The area was dirty with open cans of grease scattered throughout the shop mixed with other parts; and

(3) The shop was not properly maintained.

d. Engine Shop-

(1) Some parts were not properly tagged in that the tags on them were not identifiable;

(2) Numerous parts with serviceable tags had open ports and no protection to elements the possibility of damage from dirt and dust. Examples of this deficiency are the following:

a. Propeller Control Unit CU/84 S/N

84/58/80 Off Engine SN/8261, W.O. 1216/Nov. 84 TSO 3628.2.

_____ p. 38 _____

b. Fuel Control United P/N CCU/39/30AM, S/N 84353, Removed from Engine SN7353 TSO 1941.6.

c. Fuel Pump, P/N GB 222/3AO, SN4882, Removed from Engine, S/N7353, TSO 1941.6.

d. Fuel Control United P/N 509100, SN4903R, W.O. 1216 Removed from Engine S/N8261.

e. Feather Pump, P/N REP/26, S/N 26/58/42, TSO 1941.6, Removed from Engine, S/N 7353.

f. Low Torque Transmitter, S/N 10899, Removed from Engine, S/N 8261.

(3) Numerous parts were scattered throughout the shop and were intermixed with parts that had serviceable tags and parts that had no tags or means of identification.

(4) Certain parts were tagged with plain

green tags which were not listed in Go Air, Inc.'s manual as follows:

a. Propeller Control Unit, 111522 Number 3 position 200RC, leaking oil from flange.

b. Impeller, Go Air, Engine S/N 6394, Modification 1732.

c. Two shafts, Numbers 99522 and 98155, no information on tags.

8. The conditions described in paragraph 7 above were such that Go Air, Inc.'s facilities equipment and materials did not meet the requirements set forth in Section 145.35 and 145.47 of the Federal Aviation Regulations.

9. By reason of paragraphs 7 and 8 above, Go Air, Inc. violated Section 145.55 of the Federal Aviation Regulations.

10. All of the test equipment utilized by Go Air, Inc. in its accessory shop was not properly tested for calibration. Specifically, the calibration for all of the test

equipment in the accessory shop was due to be accomplished no later than August 31, 1984. This calibration had not been accomplished as of the date of the FAA inspection.

_____ p. 39 _____

11. As a result of the condition described in paragraph 10 above, Go Air, Inc. did not meet the requirements set forth in 145.47-(a) and (b) of the Federal Aviation Regulations.

12. By reason of paragraph 10 and 11 above, Go Air, Inc. violated Section 145.55 of the Federal Aviation Regulations.

13. Go Air, Inc. performed maintenance on accessories and returned them to service utilizing test equipment that was not properly tested for calibration as follows:

a. Voltage Regulator, Part Number 23/44018E, Serial Number NGA 52809/105, Overhaul December 6, 1984.

b. Voltage Regulator, Part Number

23/44018E, Serial Number [none given]
Overhaul December 6, 1984.

c. Voltage Regulator Part Number
23/44018E, Serial Number NBA 54533/123,
Bench Check November 14, 1984.

d. Voltage Regulator Part Number
23/44018E, Serial Number [none given]
Bench Check November 14, 1984.

e. Voltage Regulator Part Number
23/44018E, Serial Number NBA 5433/179,
Bench Check November 14, 1984.

f. Voltage Regulator Part Number
23/44018E, Serial Number NBA 56251/139,
Bench Check November 14, 1984.

g. Voltage Regulator Part Number
23/44018E, Serial Number [none given]
Bench Check November 14, 1984.

h. Voltage Regulator Part Number
23/44018E, Serial Number [none given]
Bench Check November 14, 1984.

i. DC Generator, Part Number B2112,
Serial Number 3014, Overhaul December 3,

1984.

j. DC Generator, Part Number B2112, Serial Number 74-10478, Overhaul November 11, 1984.

k. DC Generator, Part Number B2112, Serial Number 2350, Repair and test November 14, 1984.

l. DC Generator, Part Number B2112, Serial Number 2741, Overhaul November 20, 1984.

14. By reason of the matters alleged in paragraph 13 above, Go Air, Inc. violated Section 43.13(a) of the Federal Aviation Regulations.

15. By reason of the matters alleged in paragraph 13 above, Go Air, Inc. violated Section 43.13(b) of the Federal Aviation Regulations.

16. The Pacitron Fuel Test Set used by Go Air, Inc. for testing fuel quantity systems calibration was due for calibration on or

about February 21, 1984. At the time of the FAA airworthiness inspection, this calibration had not been accomplished.

17. Go Air, Inc. signed off on Work Form MM-300 as having accomplished a fuel quantity calibration test in the following instances:

a. Civil Aircraft N24V on or about March 7, 1984 (Go Air Work Order T-1194); and

b. Civil Aircraft N24V on or about February 6, 1985 (Go Air Work Order-1234).

18. Go Air, Inc. performed said fuel quantity calibration test either by using the Pacitron Fuel Test Set referenced in paragraph 16 above or by draining and filling the tank and measuring the various fuel tank indicators, The latter procedure was not provided for in the RAMA continuous airworthiness maintenance program.

19. The condition described in paragraph 16 above was such that Go Air, Inc. did not

meet the requirements set forth in Sections 145.47(a) and (b) of the Federal Aviation Regulations.

20. The aircraft referenced in paragraph 17 above, were used by RAMA in its operations conducted under Part 121 of the Federal Aviation Regulations.

21. By reason of the matters alleged in paragraphs 16 and 19 above, Go Air, Inc. violated Section 145.55 of the Federal Aviation Regulations.

22. By reason of the matters alleged in paragraphs 16 thru 18 above, Go Air, Inc. violated Section 43.13(a) of the Federal Aviation Regulations.

23. By reason of the matters alleged in paragraphs 16 thru 18 above, Go Air, Inc. violated Section 43.13(b) of the Federal Aviation Regulations.

24. By reason of the matters alleged in paragraphs 17, 18 and 20 above, Go Air,

Inc. violated Section 145.2(a) of the Federal Aviation Regulations.

25. The below listed test equipment was due for calibration testing as follows:

a. Torque Wrench, Proto (800" lbs.) [sic] S/N A93926P60 - Aug. 19, 1984.

b. Torque Wrench, Torque Controls (600 ft. lbs) S/N 8 - Nov. 12. 1984.

c. Megometer, Gen. Radio Go-Type 1862-C, S/N 852 - Jan. 7, 1983.

d. Oscillator Test Set, Loran Electronica P/N BC376K S/N2026 - Jan. 9. 1983.

e. Decade Resistance Box - March 10, 1984.

f. Turner Adapter Press. Gauge (0-600 PSI) (in Stores) - Aug. 9, 1984.

g. Turner Adapter Press. Gauge (0-4000 PSI) S/N T7068-Aug. 9, 1984.

h. Tire Press. Gauge P/N 8885 S/N 1868 - Aug. 9, 1984.

i. Tire Press. Gauge P/N 8844 S/N 1546 (in Stores) - Aug. 9, 1984.

26. None of the items listed in paragraph 25 above had been tested for calibration at the time of the FAA airworthiness inspection.

27. The conditions referenced in paragraphs 25 and 26 above were such that Go Air, Inc. did not meet the requirements set forth in Sections 145.47(a) and (b) of the Federal Aviation Regulations

28. By reason of the matters alleged in paragraphs 25 and 27 above, Go Air, Inc. violated Section 145.55 of the Federal Aviation Regulations.

29. Go Air, Inc. overhauled, repaired, modified or tested the below listed components and returned them to service:

Component	Serial No.	Date	Work Order
a. Volt reg	NBA52809/67	12/12/83	GO-T-1504
b. Gear Box	68679	1/7/85	Missing
c. DC Gen	2824	3/26/84	1504
d. DC Gen	2786	6/21/84	1504

e. Volt reg	46221/36	12/16/83	Go-T-1504
f. DC Gen	74-10478	11/14/84	1504
g. Volt Reg	56251/139	11/14/84	1504
h. Df Relay	1936	11/14/84	N/A
i. Df Relay	1499	11/14/84	N/A
j. Df Relay	1097	4/17/84	Missing
k. Df Relay	1366	11/14/84	N/A

30. Following said maintenance, Gó Air, Inc. attached improper tags to the above items. Specifically, Go Air, Inc. attached an "Approval F or Service Tag" which did not contain a certification that the article was airworthy with respect to the work performed and did not contain the record entries required by Section 43.9 of the Federal Aviation Regulations. Go Air, Inc. did not use the Form R-16 "Serviceable Tag" which was authorized by the Administrator.

31. By reason of the matters alleged in paragraphs 29 and 30 above, Go Air, Inc.

violated Section 43.5(a) of the Federal Aviation Regulations.

32. By reason of the matters alleged in paragraphs 29 and 30 above, Go Air, Inc. violated Section 43.5(b) of the Federal Aviation Regulations.

_____ p. 43 _____

33. By reason of the matters alleged in paragraphs 29 and 30 above, Go Air, Inc. violated Section 145.59(a) of the Federal Aviation Regulations.

34. On or about February 6, 1985, Go Air, signed an airworthiness release following a "C" check for Civil Aircraft N24V, a Viscount 745D aircraft being operated by RAMA under its Operations Specifications issued under Part 121 of the Federal Aviation Regulations.

35. In completing said release, Go Air, Inc. failed to complete the following sign off blocks as required by RAMA's continuous airworthiness program:

a. "C" Check Inspection Form MM-300

(1) Page 7, Items 48, 49, 50a, b, c thru 61 - no sign off in the mechanic block;

(2) Page 8, Items 62, 63, 64a, 64c, 65 66 and 67 - no sign off in the mechanic block;

(3) Page 9, Items 68, 72a thru e and 76a thru d - no sign off in the mechanic block;

(4) Page 10, Items 77 thru 82 - no signoff in the mechanic block;

(5) Page 11, Items 83 thru 93 - no signoff in the mechanic block; and

(6) Page 12, Items 94 thru 99 - no signoff in the mechanic block.

b. Avionics Ramp Inspection, Form MM-66 - Item 1 thru 21 have no signoff in the mechanic block.

36. During the period between January 4, 1982 thru March 13, 1984, Go Air performed 200/400/600 and 800 hour inspections on Civil Aircraft N140RA, a Viscount 745D

aircraft operated by RAMA under its Part 121 operations specifications, and completed Work Forms 300 and M-66 for said work. The following discrepancies were noted in said forms as:

a. Work Form MM-300, Item 139 on Page 8 - the mechanic and inspection signoff blocks are left blank; and

b. Form MM-66, Item 20 - there is a line through the mechanic signoff block and the due time and date were left blank on the top of the form.

_____ p. 44 _____

37. Each of the items referenced in paragraphs 35 and 36 above are required to be completed in accordance with RAMA continuous airworthiness program.

38. By reason of the matters alleged in paragraphs 34 thru 37 above, Go Air, Inc. violated Section 145.21(a) of the Federawl Aviation Regulations.

39. Go Air, Inc. conducted inspections on

aircraft operated by Go Inc. under Part 125 of the Federal Aviation Regulations and failed to sign for all items on the Go Inc. Inspection Forms as follows:

a. Civil Aircraft N150RC, Work Order 1235 dated February 13, 1985 - the model, registration number, serial number, date and action taken are left blank.

b. Civil Aircraft N150RC, Inspection Form dated February 29, 1984:

(1) No identification on sheet for accounting;

(2) Top of sheet not filled out.

(3) Inhibit Fuel System item - not signed off.

c. Civil Aircraft N240RC, Work Order 1233 dated March 2, 1985:

(1) Item 12 on 75 hour check for No. 2 engine - no signoff.

(2) Item 26 on 75 hour check for No. 2 engine - no signoff.

(3) Item 8 on Propeller replacement card - no signoff.

(4) Item 17 on Propeller replacement card states N/A, but it is applicable.

(5) Last item on MM-25, Propeller Installation Record, has no mechanic signature.

(6) The final signoff on MM-25 for the mechanic and inspector was not signed.

_____ p. 45 _____

(7) the maintenance release stamp is missing and not affixed to completed work order. The "mechanic" and "inspector" block is not filled out.

40. Completion of the items listed in paragraph 39 above are part of the approved inspection program for Go Inc.

41. By reason of the matter alleged in paragraphs 39 and 40 above, Go Air violated Section 43.11(a)(7) of the Federal Aviation Regulations.

42. By reason of the matters alleged in

paragraphs 39 and 40 above, Go Air violated Section 145.2(b) of the Federal Aviation Regulations.

By reason of the circumstances hereinabove described:

a. RAMA, Go Leasing, Inc. and Go Air, Inc. have not been managed or operated as separate entities with separate and distinct FAR compliance responsibilities;

b. RAMA has failed to exercise the degree of care, judgment and responsibility required of the holder of a Part 121 air carrier operating certificate;

c. Go Leasing, Inc. has failed to exercise the degree of care, judgment and responsibility required of the holder of a Part 125 operating certificate;

d. Go Air, Inc. has failed to exercise the degree of care, judgment and responsibility required of the holder of a repair station certificate;

e. RAMA has demonstrated that it presently lacks the qualifications required of a holder of an air carrier operating certificate;

f. Go Leasing, Inc. has demonstrated that it presently lacks the qualifications required of a holder of a repair station certificate.

Based upon the foregoing circumstances, the Administrator has determined that an emergency requiring immediate action exists with respect to safety in air commerce, and he has determined that safety

in air commerce and the public interest require the immediate revocation, on an emergency basis, of Air Carrier Operating Certificate No. ASW-61, Operating Certificate No. WE-34-1 and Repair Station Certificate No. 434-1.

NOW. THEREFORE, IT IS ORDERED, pursuant to the authority vested in the Administra-

tor by Section 609 and 1005 of the Federal Aviation Act of 1958, as amended, that:

(1) Effective immediately, Air Carrier Operating Certificate No. ASW-61 held by Royal American Airways, Inc. is hereby revoked on an emergency basis;

(2) Effective immediately, Operating Certificate No. WE-34-1 held by Go Leasing, Inc. is hereby revoked on an emergency basis;

(3) Effective immediately, Repair Station Certificate No. 434-1 held by Go Air, Inc. is hereby revoked on an emergency basis.

(4) Said certificates be surrendered immediately by mail or delivery to the Regional Counsel of the Federal Aviation Administration, Post Office Box 92007, Worldway Postal Center, Los Angeles, California 90009 (envelope enclosed) or at the Office of Regional Counsel, Room 6W14, 15000 Aviation Boulevard, Lawn-

dale, California 90260.

/s/ DeWitte T. Lawson, Jr.
Regional Counsel

APPEAL

This Order may be appealed by the filing of an Appeal with the National Transportation Safety Board, Room 822, Docket Section, Washington, D.C. 20594, within ten (10) days of the date of service of this Order. A copy of your Notice of Appeal should be furnished this office. In view of the fact that your certificates have been revoked on an emergency basis, and the Administrator has determined that safety in air commerce and the public interest require the immediate effectiveness of this Order, the revocation of said certificates shall remain effective during the pendency of any appeal proceedings before the National Transportation Safety Board. In the event of an appeal of this Order, Part 821 of the National Transporation Safety

Board's Rules of Practice will be applicable to and govern the proceedings, and a copy of this Order will be filed with the Board and will constitute the Administrator's Complaint.

SERVED: Nov. 7, 1986
NTSB Order No. EA-2431

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the
NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 24th day of October, 1986

DONALD D. ENGEN, Administrator, Federal Aviation Administration, Complainant, v. GO AIR, INC., Respondent.	Docket: SE-6767

OPINION AND ORDER

The respondent, by counsel, has appealed

to the Board an order Administrative Law Judge Patrick G. Geraghty issued on May 5, 1986 at the conclusion of the evidentiary hearing that had been convened pursuant to respondent's appeal from an emergency order of the Administrator revoking its Part 145 repair station certificate. 1/ The law judge's order granted a

---

1/ The Administrator's order, dated May 2, 1985, also revoked the Part 121 certificate held by Royal American Airways, Inc. and the Part 125 certificate held by Go Leasing, Inc., two companies closely affiliated with respondent. Royal American (Docket SE-6765) and respondent waived the expedited procedures applicable to emergency cases under the Board's Rules of Practice, 49 CFR Part 821, subpart I. Go Leasing (Docket SE-6766) did not waive those procedures. A hearing on the charges in the revocation order against it was held in

motion filed by the Administrator for summary judgment on the numerous regulatory violations the revocation order--the complaint herein--alleged respondent had committed in connection with its repair or maintenance of aircraft operated commercially by Go Leasing, Inc. and Royal American Airways, Inc. in their charter and scheduled services. 2/ Respondent, who put on no evidence at the hearing in defense of the charges, does not on this appeal challenge the sufficiency of the evidence adduced by the Administrator in support of his allegations. Rather, respondent presents various procedural or jurisdictional contentions which it maintains warrants the dismissal or invalidation of the revocation order. 3/ For the reasons discussed below, we will deny the appeal.

2/ The portions of the complaint pertaining to respondent (pp. 1-3 and 37-47) have been attached to this opinion as an Appendix. The law judge did not affirm the allegations in paragraph 30 with respect to the component listed at b. of paragraph 29. See tr. at 121. As to the remaining allegations, the law judge found that the Administrator's evidence established at least a prima facie case which, in the absence of contrary evidence, was sufficient to meet his burden of proof.

3/ Respondent's brief is styled a "Combined Appeal Brief and Motion to Dismiss" and on it first page paradoxically requests that the Board "dismiss this action on grounds the Board lacks jurisdiction to hear it." The basis for respondent's request appears to be its belief that the Administrator does not have authority to revoke or suspend certificates for regulatory violations. Respondent asserts "[i]f FAA

has no authority to impose the sanction of revocation or suspension on account of offenses or violations, ergo, the Board has no jurisdiction to hear such a case" (brief at 11). Respondent's motion is self-defeating. If the Board could not hear this appeal, it could not grant respondent the relief it in effect seeks; namely the invalidation of the Administrator's order. Since we assume respondent does not want the Board to dismiss the appeal it initiated, we will deny the motion to dismiss.

Respondent in its brief presents numerous arguments to the effect that under the Federal Aviation Act ("FA Act"), the Administrative Procedure Act, and the U.S. Constitution the Administrator cannot lawfully revoke or suspend certificates for violations of air safety regulations, but must instead pursue civil penalty actions that afford certificate holders the

opportunity for jury trial on such offenses in a federal district court. It further argues that even if the necessary statutory authority existed, the Administrator has not adopted appropriate internal procedures or regulations for the proper exercise of such authority. These same arguments were advanced by Go Leasing on appeal from the Board's affirmation (with a reduction in sanction) of the Administrator's emergency revocation of its Part 125 certificate in the order under consideration here. 4/ In a thorough and well-reasoned opinion the Court rejected Go Leasing's multi-faceted challenge to the Administrator's certificate action against it. Go Leasing v. NTSB and FAA, C.A. 9, No. 85-7401, decided September 30, 1986. 5/ Specifically, the Court held, among

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4/ See NTSB Order EA-2190 (1985).

5/ Also of relevance in this proceeding

are the Court's observations concerning certain accusation by counsel for Go Leasing, who also represents respondent, on matters relating to the investigation that led to the charges and their prosecution (slip op. at 5): "Before we proceed with our analysis of the legitimate issues presented in this appeal, we reject Go Leasing's numerous and repetitive assertions of a continuing conspiracy by the FAA to cover up its alleged lack of authority for so-called punitive certificate actions. Nor do we approve of Go Leasing's impugning the ethics of FAA officials, its counsel, and the NTSB. There is no evidence whatever of any cover-up or of any unethical conduct on the part of the FAA or NTSB."

other things, that the Administrator had legal discretion to choose between civil penalties and certificate action for violations of safety regulations and "that

[he] need not promulgate rules constraining his discretion as to when to employ a particular statutory enforcement action" (Id. slip op. at 17), that the Administrator's regulations relating to enforcement actions (14 C.F.R. §13.19) had been validly adopted, and, generally, that the Administrator's standards and policies concerning how various enforcement matters will be prosecuted withstand due process scrutiny. We find the Court's disposition of these and other similar issues, many of which involve questions beyond our cognizance, to be controlling in this proceeding to the extent it involves the same or closely related contentions. 6/

In addition to the attack on the Administrator's authority to revoke its certificate, respondent objects to the law judge's disposition of two procedural matters. The first of these objections is the claim that respondent was denied a

"speedy trial" because the law judge, at the time he scheduled the week of December 9, 1985 to hear the appeals of Royal American

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6/ One argument the court did not have to consider was the claim that the revocation order is invaled because it does not state, as assertedly required by section 125.29-(b), that the alleged violations would have been grounds for denying an application for a certificate. We find the point meritless. The cited regulation does not impose a notice requirement on the Administrator. Rather it merely provides advice concerning additional circumstances under which the Administrator might exercise his authority to suspend or revoke a certificate.

in Docket SE-6765 and of respondent as well, if time permitted, declined to reschedule two unrelated cases that

previously had been set for the following week so that more time would be available to hear respondent's appeal. 7/ We find respondent's objection to be without merit. To begin with, it is somewhat anomalous for respondent to raise any issue concerning the pace of this proceeding, since it waived expedited review of the emergency order and subsequently requested several continuances which effectively precluded a prompt disposition of its appeal. In fact, one of those requests, made on December, 1985, sought "at least" a 90-day continuance on the ground that it would be impossible to prepare its case by December 9. 8/ In these circumstances, we do not agree that the law judge's disinclination to inconvenience the parties in cases whose hearings were scheduled for the week of December 16 can be deemed "arbitrary and capricious."

Respondent also challenges the law

judge's denial of its request for a change of venue for the hearing from Phoenix to Tucson, Arizona. 9/ We find no prejudicial error in this ruling. Although the law judge had advised the parties in February, 1986 that respondent's hearing would be held either in

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7/ As it turned out, the Royal American hearing consumed the entire week and had to be continued in February, 1986.

8/ The law judge denied that request as premature on December 6.

9/ Respondent's reason for requesting the change was its asserted inability "to pay the cost of housing in Phoenix for witnesses." The Administrator opposed the motion for change in venue.

Phoenix, Arizona or in Los Angeles, California, respondent raised no objection to either location until April 17, follow-

ing a notification (issued on April 4) that the hearing had been scheduled for May 5-9 in Phoenix. Given respondent's failure to contest either of the hearing sites proposed by the law judge until after one had been selected, we do not believe his denial of the request for a change of venue as untimely was an abuse of discretion.

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal and its motion to dismiss are denied, and

2. The order of the law judge granting the Administrator's motion for summary judgment is affirmed.

BURNETT, Chairman, GOLDMAN, Vice Chairman, LAUBER and NALL, members of the Board, concurred in the above opinion and order.

Not to be published, see Local Rule 8(f)

UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit

No. 87-1000 September Term, 1987

Go Air, Inc.,

Petitioner

v. Filed Mar 7, 1988

National Transportation Safety Board and Donald D. Engen, Administrator, Federal Aviation Administration,

Respondents

PETITION FOR REVIEW OF AN ORDER OF THE NATIONAL TRANSPORTATION SAFETY BOARD

BEFORE: Ruth B. Ginsburg, Starr and Buckley, Circuit Judges

JUDGMENT

This petition for review of a decision of the National Transportation Safety Board was considered on the administrative record and on the briefs filed by counsel for the parties. The court has determined that the issues presented occasion no need for a published opinion. See D.C. Cir. Rule 14(c).

The several arguments raised by petitioner have been considered and decided in a manner adverse to petitioner's contentions. See Komjathy v. NTSB, 832 F.2d 1294 (D.C. Cir. 1987); Go Leasing v. NTSB, 800 F.2d 1514 (9th Cir. 1986). The former decision is law of this circuit, and we find the latter decision entirely persuasive. For the reasons stated in those opinions, it is

ORDERED and **ADJUDGED** by the court that the petition for review be denied.

SUPREME COURT OF THE UNITED STATES

No. A-853

GO AIR, INC.

Applicant,

v.

NATIONAL TRANSPORTATION SAFETY BD., ET AL.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for the applicant,

IT IS ORDERED that the time for filing a petition for a writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including July 5, 1988.

/s/ William H. Rehnquist
Chief Justice of the United States

Dated this 6th day of May, 1988.

Amend. 5 **CONSTITUTION**

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property

be taken for public use, without just compensation.

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5 U.S.C. § 551(4) (1982)

For the purpose of this subchapter --

(1) "agency" means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include --

* * * *

* * * *

(4) "rule" means the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof,

prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing.

* * *

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5 U.S.C. § 552(a)(1) (1982)

Public information; agency rules, opinions, orders, records, and proceedings

(a) Each agency shall make available to the public information as follows:

(1) Each agency shall separately state and currently publish in the Federal Register for the guidance of the public --

(A) descriptions of its central and field organization and the established places at which, the employees (and in the case of a uniformed service, the members) from whom, and the methods whereby, the public may

obtain information, make submittals or requests, or obtain decisions;

(B) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal and informal procedures available;

(C) rules of procedure, descriptions of forms available or the places at which forms may be obtained, and instructions as to the scope and contents of all papers, reports, or examinations;

(D) substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency; and

(E) each amendment, revision, or repeal of the foregoing.

Except to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published. For the purpose of this paragraph, matter reasonably available to the class of persons affected thereby is deemed published in the Federal Register when incorporated by reference therein with the approval of the Director of the Federal Register.

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5 U.S.C. § 553 (1982)

Rule making

(a) This section applies, according to the provisions thereof, except to the extent that there is involved --

(1) a military or foreign affairs function of the United States; or

(2) a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts.

(b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include --

(1) a statement of the time, place, and nature of public rule making proceedings;

(2) reference to the legal authority under which the rule is proposed; and

(3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.

Except when notice or hearing is required by statute, this subsection does not apply --

(A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or

(B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on

the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.

(d) The required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except --

(1) a substantive rule which grants or recognizes an exemption or relieves a restriction;

(2) interpretative rules and statements of policy; or

(3) as otherwise provided by the agency for good cause found and published with the rule.

(e) Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.

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5 U.S.C. § 706 (1982)

Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall --

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be --

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

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49 U.S.C. app. § 1429(a) (1982)

Reinspection or reexamination; amendment, suspension, or revocation of certification

(a) Procedure; notification; hearing; appeal to National Transportation Safety Board; judicial review

The Secretary of Transportation

[Administrator] may, from time to time, reinspect any civil aircraft, aircraft engine, propeller, appliance, air navigation facility, or air agency, or may reexamine any civil airman. If, as a result of any such reinspection or reexamination, or if, as a result of any other investigation made by the Secretary of Transportation [Administrator], he determines that safety in air commerce or air transportation and the public interest requires, the Secretary of Transportation [Administrator] may issue an order amending, modifying, suspending, or revoking, in whole or in part, any type certificate, production certificate, airworthiness certificate, airman certificate, air carrier operating certificate, air navigation facility certificate (including airport operating certificate), or air agency certificate. Prior to amending, modifying, suspending, or revoking any of

the foregoing certificates, the Secretary of Transportation [Administrator] shall advise the holder thereof as to any charges or other reasons relied upon by the Secretary of Transportation [Administrator] for his proposed action and, except in cases of emergency, shall provide the holder of such a certificate an opportunity to answer any charges and be heard as to why such certificate should not be amended, modified, suspended, or revoked. Any person whose certificate is affected by such an order of the Secretary of Transportation [Administrator] under this section may appeal the Secretary of Transportation's [Administrator's] order to the National Transportation Safety Board and the National Transportation Safety Board may, after notice and hearing, amend, modify, or reverse the Secretary of Transportation's [Administrator's] order if it finds that safety in air commerce or air

transportation and the public interest do not require affirmation of the Secretary of Transportation's [Administrator's] order. In the conduct of its hearings the National Transportation Safety Board shall not be bound by findings of fact of the Secretary of Transportation [Administrator]. The filing of an appeal with the National Transportation Safety Board shall stay the effectiveness of the Secretary of Transportation's [Administrator's] order unless the Secretary of Transportation [Administrator] advises the National Transportation Safety Board that an emergency exists and safety in air commerce or air transportation requires the immediate effectiveness of his order, in which event the order shall remain effective and the National Transportation Safety Board shall finally dispose of the appeal within sixty days after being so advised by the Secretary of Transportation [Administrator]. The person substan-

tially affected by the National Transportation Safety Board's order may obtain judicial review of said order under the provisions of section 1486 of this Appendix, and the Secretary of Transportation [Administrator] shall be made a party to such proceedings.

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49 U.S.C. § 1485 (1982)

Orders, notices, and service

(a) Effective date of orders; emergency orders

Except as otherwise provided in this chapter, all orders, rules, and regulations of the Board[1] or the Secretary of Transportation [Administrator] shall take effect within such reasonable time as the Board or [Administrator] may prescribe, and shall continue in force until their further order, rule, or regulation, or for a

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[1] Refers to the Civil Aeronautics Board, which no longer exists.

specified period of time, as shall be prescribed in the order, rule, or regulation: Provided, That whenever the [Administrator] is of the opinion that an emergency requiring immediate action exists in respect of safety in air commerce, the [Administrator] is authorized, either upon complaint or his own initiative without complaint, at once, if he so orders, without answer or other form of pleading by the interested person or persons, and with or without notice, hearing, or the making or filing of a report, to make such just and reasonable orders, rules, or regulations, as may be essential in the interest of safety in air commerce to meet such emergency; Provided further, That the [Administrator] shall immediately initiate proceedings relating to the matters embraced in any such order, rule, or regulation, and shall, insofar as practicable, give preference to such proceed-

ings over all others under this chapter.

(b) Designation of agent for service

It shall be the duty of every air carrier and foreign air carrier to designate in writing an agent upon whom service of all notices and process and all orders, decisions, and requirements of the Board and the [Administrator] may be made for and on behalf of said carrier, and to file such designation with the [Administrator] and in the office of the secretary of the Board, which designation may from time to time be changed by like writing similarly filed. Service of all notices and process and orders, decisions, and requirements of the [Administrator] or the Board may be made upon such carrier by service upon such designated agent at his office or usual place of residence with like effect as if made personally upon such carrier, and in default of such designation of such agent, service or any notice or other process in

any proceedings before said [Administrator] or Board, may be made by posting such notice, process, order, requirement, or decision in the office of the [Administrator] or with the secretary of the Board.

(c) Manner of service

Service of notices, processes, orders, rules, and regulations upon any person may be made by personal service, or upon an agent designated in writing for the purpose, or by registered or certified mail addressed to such person or agent. Whenever service is made by registered or certified mail, the date of mailing shall be considered as the time when service is made.

(d) Suspension or modification of orders

Except as otherwise provided in this chapter, the [Administrator] or the Board is empowered to suspend or modify their orders upon such notice and in such manner as they shall deem proper.

(e) Compliance with orders

It shall be the duty of every person subject to this chapter, and its agents and employees, to observe and comply with any order, rule, regulation, or certificate issued by the [Administrator] or the Board under this chapter affecting such person so long as the same shall remain in effect.

(f) Findings of fact; service of orders

Every order of the [Administrator] or the Board shall set forth the findings of fact upon which it is based, and shall be served upon the parties to the proceeding and the persons affected by such order.

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49 U.S.C. app. § 1486 (1982)

Judicial review

(a) Orders subject to review; petition for review

Any order, affirmative or negative, issued by the Board or Secretary of Transportation [Administrator] under this chapter, except any order in respect of any

foreign air carrier subject to the approval of the President as provided in section 1461 of this Appendix, shall be subject to review by the courts of appeals of the United States or the United States Court of Appeals for the District of Columbia upon petition, filed within sixty days after the entry of such order, by any person disclosing a substantial interest in such order. After the expiration of said sixty days a petition may be filed only by leave of court upon a showing of reasonable grounds for failure to file the petition theretofore.

(b) Venue

A petition under this section shall be filed in the court for the circuit wherein the petitioner resides or has his principal place of business or in the United States Court of Appeals for the District of Columbia.

(c) Notice to Board or Secretary of

Transportation; filing of record

A copy of the petition shall, upon filing, be forthwith transmitted to the Board or [Administrator] by the clerk of the court, and the Board or [Administrator] shall thereupon file in the court the record, if any, upon which the order coplained of was entered, as provided in section 2112 of title 28.

(d) Power of court

Upon transmittal of the petition to the Board or [Administrator], the court shall have exclusive jurisdiction to affirm, modify, or set aside the order complained of, in whole or in part, and if need be, to order further proceedings by the Board or [Administrator]. Upon good cause shown and after reasonble notice to the Board or [Admininstrator] interlocutory relief may be granted by stay of the order or by such mandatory or other relief as may be appropriate.

(e) Conclusiveness of findings of fact; objections

The findings of facts by the Board or [Administrator], if supported by substantial evidence, shall be conclusive. No objection to an order of the Board or [Administrator] shall be considered by the court unless such objection shall have been urged before the Board or [Administrator] or, if it was not so urged, unless there were reasonable grounds for failure to do so.

(f) Review by Supreme Court

The judgment and decree of the court affirming, modifying, or setting aside any such order of the Board or [Administrator] shall be subject only to review by the Supreme Court of the United States upon certification or certiorari as provided in section 1254 of title 28.

49 U.S.C. app. § 1487 (1982)

Judicial enforcement; jurisdiction; application; costs

(a) If any person violates any provision of this chapter, or any rule, regulation, requirement, or order thereunder, or any term, condition, or limitation of any certificate or permit issued under this chapter, the Board or Secretary of Transportation [Administrator], as the case may be, their duly authorized agents, or, in the case of a violation of section 1514 of this Appendix, the Attorney General, or, in the case of a violation of section 1371(a) of this Appendix, any party in interest, may apply to the district court of the United States, for any district wherein such person carries on his business or wherein the violation occurred, for the enforcement of such provision of this chapter, or of such rule, regulation, requirement, order, term, condition, or

limitation; and such court shall have jurisdiction to enforce obedience thereto by a writ of injunction or other process, mandatory or otherwise, restraining such person, his officers, agents, employees, and representatives from further violation of such provision of this chapter or of such rule, regulation, requirement, order, term, condition or limitation, and requiring their obedience thereto.

(b) Upon the request of the Board or [Administrator], any district attorney of the United States to whom the Board or [Administrator] may apply is authorized to institute in the proper court and to prosecute under the direction of the Attorney General all necessary proceedings for the enforcement of the provisions of this chapter or any rule, regulation, requirement, or order thereunder, or any term, condition, or limitation of any certificate or permit, and for the punish-

ment of all violations thereof, and the costs and expenses of such prosecutions shall be paid out of the appropriations for the expenses of the courts of the United States.

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14 C.F.R. § 408.25 (1952)

Emergency suspensions. Under section 609 of the act, in cases of emergency a type certificate, production certificate, airworthiness certificate, airman certificate, air carrier operating certificate, air navigation facility certificate, or air agency certificate may be suspended, in whole or in part, for a period not in excess of 30 days, without regard to any requirement as to notice and hearing; the [Civil Aeronautics] Administration shall immediately give notice of such suspension to the holder of such certificate, and shall enter upon a hearing which shall be

disposed of as speedily as possible; and during the pendency of the proceeding the Administration may further suspend such certificate, in whole or in part, for an additional period not in excess of 30 days. In the event the condition or conduct of a certificate holder is such as to indicate immediate danger of injury to person or damage to property, and the immediate suspension of the certificate might reasonably be expected to avert such injury or damage, an emergency will be deemed to exist within the meaning of section 609. Under such circumstances, any employee of the Administration charged with the duty of examining a certificate holder or enforcing aeronautical statutes and regulations, may suspend for a period not to exceed 30 days, any of the foregoing certificates issued by the Administration other than an air carrier operating certificate, which may be suspended in an emergency only by the

Administrator. Any such employee of the Administration making an emergency suspension will, if practicable, notify orally the party or parties involved, that an emergency suspension of the certificate has been made pursuant to the authority of section 609, and will, within a reasonable time thereafter, confirm such notification in writing. Formal proceedings will be instituted immediately, during the pendency of which the Administrator, a Deputy Administrator, or the Regional Administrator serving the region in which the condition is likely to exist or conduct is likely to occur, may further suspend such certificate, in whole or in part, for an additional period not in excess of 30 days.

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14 C.F.R. 13.19 (1987)

Certificate action.

(a) Under section 609 of the Federal Aviation Act of 1958 (49 U.S.C. 1429), the

Administrator may reinspect any civil aircraft, aircraft engine, propeller, appliance, air navigation facility, or air agency, and may re-examine any civil airman. Under section 501(e) of the FA Act, any Certificate of Aircraft Registration may be suspended or revoked by the Administrator for any cause that renders the aircraft ineligible for registration.

(b) If, as a result of such a reinspection, re-examination, or other investigation made by the Administrator under section 609 of the FA Act, the Administrator determines that the public interest and safety in air commerce requires it, the Administrator may issue an order amending, suspending, or revoking, all or part of any type certificate, production certificate, airworthiness certificate, airman certificate, air carrier operating certificate, air navigation facility certificate, or air agency certificate. This authority may be

exercised for remedial purposes in cases involving the Hazardous Materials Transportation Act (49 U.S.C. 1801 et seq.) or regulations issued under that Act. This authority is also exercised by the Chief Counsel, the Assistant Chief Counsel for Regulations and Enforcement, and the Regional Counsel concerned. If the Administrator finds that any aircraft registered under Part 47 of this chapter is ineligible for registration or if the holder of a Certificate of Aircraft Registration has refused or failed to submit AC Form 8050-73, as required by § 47.51 of this chapter, the Administrator issues an order suspending or revoking that certificate. This authority as to aircraft found ineligible for registration is also exercised by the Aeronautical Center Counsel.

(c) Before issuing an order under paragraph (b) of this section, the Chief

Counsel, the Assistant Chief Counsel for Regulations and Enforcement, the Regional Counsel concerned, or the Aeronautical Center Counsel (as to matters under Title V of the FA Act) advises the certificate holder of the charges or other reasons upon which the Administrator bases the proposed action and, except in an emergency, allows the holder to answer any charges and to be heard as to why the certificate should not be amended, suspended, or revoked. The holder may, by checking the appropriate box on the form that is sent to the holder with the notice of proposed certificate action, elect to --

(1) Admit the charges and surrender his or her certificate;

(2) Answer the charges in writing;

(3) Request that an order be issued in accordance with the notice of proposed certificate action so that the certificate holder may appeal to the

National Transportation Safety Board, if the charges concerning a matter under Title VI of the FA Act;

(4) Request an opportunity to be heard in an informal conference with the FAA counsel; or

(5) Request a hearing in accordance with Subpart D of this part if the charges concern a matter under Title V of the FA Act.

Except as provided in 13.35(b), unless the certificate holder returns the form and, where required, an answer or motion, with a postmark of not later than 15 days after the date of receipt of the notice, the order of the Administrator is issued as proposed. If the certificate holder has requested an informal conference with the FAA counsel and the charges concern a matter under Title V of the FA Act, the holder may after that conference also request a formal hearing in writing with a postmark

of not later than 10 days after the close of the conference. After considering any information submitted by the certificate holder, the Chief Counsel, the Assistant Chief Counsel for Regulations and Enforcement, the Regional Counsel concerned, or the Aeronautical Center Counsel (as to matters under Title V of the FA Act) issues the order of the Administrator, except that if the holder has made a valid request for a formal hearing on a matter under Title V of the FA Act initially or after an informal conference, Subpart D of this part governs further proceedings.

(d) Any person whose certificate is affected by an order issued under this section may appeal to the National Transportation Safety Board. If the certificate holder files an appeal with the Board, the Administrator's order is stayed unless the Administrator advises the Board that an emergency exists and safety in air commerce

requires that the order become effective immediately. If the Board is so advised, the order remains effective and the Board shall finally dispose of the appeal within 60 days after the date of the advice. This paragraph does not apply to any person whose Certificate of Aircraft Registration is affected by an order issued under this section.

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14 C.F.R. § 13.25 (1988)

Injunctions

(a) Whenever it is determined that a person has engaged, or is about to engage, in any act or practice constituting a violation of the Federal Aviation Act of 1958, or any regulation or order issued under it for which the FAA exercises enforcement responsibility, or, with respect to the transportation or shipment by air of any hazardous materials, in any act or practice constituting a violation of

the Hazardous Materials Transportation Act, or any regulation or order issued under it for which the FAA exercises enforcement responsibility, the Chief Counsel, the Assistant Chief Counsel for Regulations and Enforcement, the Regional Counsel concerned, or the Aeronautical Center Counsel may request the United States Attorney General, or the delegate of the Attorney General, to bring an action in the appropriate United States District Court for such relief as is necessary or appropriate, including mandatory or prohibitive injunctive relief, and punitive damages, as provided by section 1007 of the Federal Aviation Act of 1958 (49 U.S.C. 1487) and section 111(a) of the Hazardous Materials Transportation Act (49 U.S.C. 1810).

* * * *

Supreme Court, U.S.
FILED
SEP 15 1988
JOSEPH F. SPANIOL, JR.

(2)

No. 88-118

In the Supreme Court of the United States

OCTOBER TERM, 1988

GO AIR, INC., PETITIONER

v.

ADMINISTRATOR, FEDERAL AVIATION ADMINISTRATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

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Page

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Capuano v. *NTSB*, 843 F.2d 56 (1st Cir. 1988) 5
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In the Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-118

GO AIR, INC., PETITIONER

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

Petitioner contends (1) that the Federal Aviation Administration (FAA) violated the Due Process Clause of the Constitution when it revoked petitioner's certificate to service parts used in commercial airplanes, and (2) that the FAA violated the Administrative Procedure Act (APA) by not publishing and promulgating an agency policy manual as a substantive rule.

1. Petitioner is in the business of servicing parts used in commercial passenger aircraft. During February and March 1985, the FAA conducted an inspection of petitioner and its affiliates. The FAA found widespread violations of the agency's safety regulations. Thus, on May 2, 1985, the FAA exercised its authority under the Federal Aviation Act of 1958 (49 U.S.C. App. 1429(a) and 1485)

and revoked petitioner's Repair Station Certificate. Pet. App. 2a-3a, 27a, 30a n.1.[1]

The FAA's revocation order lists numerous safety violations. For example, the order cites instances of improper maintenance, deficiencies in petitioner's facilities and equipment, and significant problems with petitioner's recordkeeping (Pet. App. 6a-25a). The FAA concluded that petitioner "has failed to exercise the degree of care, judgment and responsibility required of the holder of a repair station certificate" (*id.* at 25a). The FAA also found that petitioner's continued operation posed an immediate risk to public safety (*id.* at 26a). Accordingly, the FAA "determined that safety in air commerce and the public interest" required that the agency's revocation order take effect immediately (*ibid.*).

Petitioner appealed the FAA order to the National Transportation Safety Board (NTSB). An evidentiary hearing was held before an administrative law judge. The administrative law judge affirmed all the pertinent findings in the FAA's revocation order. The full NTSB affirmed the administrative law judge's findings and decision. Pet. App. 29a-40a.[2]

The court of appeals denied petitioner's petition for judicial review of the NTSB decision. The court of appeals, in a brief unpublished order, stated that petitioner's arguments "have been considered and decided in a manner adverse to petitioner's contentions" (Pet. App. 42a).

2. The decision of the court of appeals is correct and does not conflict with any decision of this Court or any

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[1] The FAA also revoked the operating certificates held by petitioner's affiliates, Go Leasing, Inc. and Royal American Airways, Inc. Those entities are not a party to this action.

[2] Petitioner raised procedural issues before the NTSB, but it did not challenge the sufficiency of the evidence presented by the FAA.

other court of appeals. Thus, no further review is warranted.

a. Petitioner contends (Pet. 18-29) that its license to service and repair airplane parts was revoked without due process of law. Every court of appeals to consider such a claim has rejected it. Under the Federal Aviation Act, when the FAA Administrator issues an emergency order revoking a certificate to operate, an aggrieved party may immediately seek review by the NTSB. The NTSB must conduct a de novo evidentiary hearing on the merits of the FAA's findings (49 U.S.C. App. 1429(a)). And the NTSB must "finally dispose of the appeal within sixty days" (49 U.S.C. App. 1429(a)).[3] The decision of the NTSB is then subject to judicial review in a court of appeals (49 U.S.C. App. 1429, 1486). Three courts of appeals have held that this administrative process, coupled with judicial review, satisfies the Due Process Clause. See *Go Leasing, Inc.* v. *NTSB*, 800 F.2d 1514, 1523-1524 (9th Cir. 1986); *Morton* v. *Dow*, 525 F.2d 1302, 1305 (10th Cir. 1975); *Air East, Inc.* v. *NTSB*, 512 F.2d 1227, 1231 (3d Cir.), cert. denied, 423 U.S. 863 (1975).

The uniform view of the circuits is clearly correct. It is well settled that an agency may take emergency action when there is immediate danger to the public. See, *e.g.*, *Ewing* v. *Mytinger & Casselberry, Inc.*, 339 U.S. 594 (1950) (drug with misleading label may be seized pending a hearing); *North American Cold Storage Co.* v. *Chicago*, 211 U.S. 306 (1908) (food unfit for human consumption may be summarily seized and destroyed). And as the Third Circuit noted in *Air East, Inc.* v. *NTSB*, in the case of a violation of the FAA's safety regulations, "the stakes [are] high indeed—a threat to the lives of passengers who en-

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[3] In this case, petitioner waived its right to a ruling within 60 days by requesting several continuances (Pet. App. 38a).

trust[ ] themselves" to air carriers (512 F.2d at 1231). Thus, the risk to public safety justified the FAA's immediate revocation of petitioner's certificate; petitioner then was entitled to no more process than a prompt evidentiary hearing before the NTSB and judicial review of the decision of that body. See *Morton* v. *Dow*, 525 F.2d at 1305; *Air East, Inc.*, 512 F.2d at 1232.[4]

Moreover, the Ninth Circuit has held that the FAA's finding of an emergency—which makes the revocation of an FAA certificate effective immediately—is subject to judicial review in a court of appeals. See *Nevada Airlines, Inc.* v. *Bond*, 622 F.2d 1017 (9th Cir. 1980). Thus, in this case, petitioner could have sought immediate review of the FAA's finding of an emergency and could have asked the court of appeals for any appropriate temporary relief.[5] In a case where safety concerns are paramount, these multiple paths of review plainly satisfy due process.

b. Petitioner next contends (Pet. 30-36) that the FAA violated the APA (5 U.S.C. 552(a)(1) and 553) by not publishing in the *Federal Register* or promulgating as a substantive rule paragraph 1203.g of the FAA's *Compliance and Enforcement Program Manual* (May 16,

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[4] Petitioner repeatedly attacks the motives and integrity of FAA officials. The Ninth Circuit in *Go Leasing, Inc.* v. *NTSB, supra*, commented on similar allegations: "[W]e reject Go Leasing's numerous and repetitive assertions of a continuing conspiracy by the FAA to cover up its alleged lack of authority for so-called punitive certificate actions. Nor do we approve of Go Leasing's impugning of the ethics of FAA officials, its counsel, and of the NTSB. There is no evidence whatever of any cover-up or of any unethical conduct on the part of the FAA or NTSB" (800 F.2d at 1518).

[5] Before the FAA issued its order in this case, petitioner was well aware of the FAA inspection of its facilities. See Pet. 9. Thus, petitioner could have prepared an administrative record that would have supported any claim that the FAA acted arbitrarily or beyond its authority.

1980). That paragraph sets forth general guidelines used by the FAA's legal staff in deciding whether to take emergency actions.[6] Petitioner's claim is without merit.

The APA requires an agency to publish in the *Federal Register* its statements of general policy. See 5 U.S.C. 552(a)(1). That requirement, however, "attaches only to matters which if not published would adversely affect a member of the public." *Donovan* v. *Wollaston Alloys, Inc.*, 695 F.2d 1, 9 (1st Cir. 1982) (collecting cases). Paragraph 1203.g is not such a matter. The First Circuit recently addressed a similar claim involving other paragraphs in the FAA's *Compliance and Enforcement Program Manual*. See *Capuano* v. *NTSB*, 843 F.2d 56 (1st Cir. 1988). The First Circuit correctly held (*id.* at 58) that the manual "is not intended to affect the rights, duties, obligations, or conduct" of the public and need not be published in the *Federal Register*. The manual "fits best the description of [5 U.S.C.] § 552(a)(2)(C)[, which refers to (among other things)] 'administrative staff manuals and instructions to staff that affect a member of the public' " (843 F.2d at 57-58). The FAA "has published the manual here at issue and the public can easily inspect, copy, or buy it. The APA requires no more" (*ibid.*).

Nor is paragraph 1203.g of the agency manual a substantive rule that must be promulgated under 5 U.S.C. 553. Paragraph 1203.g contains internal FAA enforcement policies, not rules of conduct applicable to regulated entities. As the court of appeals held in *Go Leasing, Inc.* v. *NTSB*, the FAA "need not promulgate rules constraining

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[6] Paragraph 1203.g states, in part: "Emergency suspension or revocation of a certificate should be used only as an emergency safety measure and, thus, to provide immediate protection to the public. * * * An emergency suspension or revocation should never be used for punitive reasons."

[its] discretion as to when to employ a particular statutory enforcement action" (800 F.2d at 1523). Paragraph 1203.g is undoubtedly important to the FAA's administration of the Federal Aviation Act. But "[n]ot every principle essential to the effective administration of a statute can or should be cast immediately into the mold of a general rule." *SEC* v. *Chenery Corp.*, 332 U.S. 194, 202 (1947).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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No. 88-118

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v.

ADMINISTRATOR, FEDERAL AVIATION ADMINISTRATION, ET AL.,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITIONER'S REPLY BRIEF

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TABLE OF CONTENTS

Page

I. GOVERNMENT CONCEDES NEED FOR PROMPT HEARING; THUS THE ONLY ISSUE: IS THE NINTH CIRCUIT SOLUTION APPROPRIATE? 1

II. THE APA ISSUES 5

TABLE OF AUTHORITIES

Cases: Page

Anderson v. Butz, 550 F.2d 459 (9th Cir. 1977) 7

Donovan v. Wollaston Alloys, Inc., 695 F.2d 1 (1st Cir. 1982) 7

Morton v. Ruiz, 415 U.S. 199 (1974).....5

Nevada Airlines v. Bond, 622 F.2d 1017 (9th Cir. 1980) 1,2,3,4

SEC v. Chenery Corp., 332 U.S. 194 (1947) 6

Statutes:

Federal Aviation Act of 1958, as amended, 49 U.S.C. app. §§ 1301-1552 (1982):

§ 1429(a) 2

§ 1486 2,3

§ 1487 2

Miscellaneous:

14 C.F.R. § 408.25 (1952) 5

Fed. R. Civ. P. 65(b) 3

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PETITIONER'S REPLY BRIEF

I. GOVERNMENT CONCEDES NEED FOR PROMPT HEARING; THUS THE ONLY ISSUE: IS THE NINTH CIRCUIT SOLUTION APPROPRIATE?

By failing to deny that the emergency power is the executive-branch equivalent to a judicial temporary restraining order (TRO), the government obviously concedes that it is. Additionally, by citing Nevada Airlines Inc. v. Bond, 622 F.2d 1017 (9th Cir. 1980), it concedes the need for a prompt hearing on whether there is a valid emergency. That case was the first to note that that issue is distinct from the underlying charges and thus requires a prompt hearing rather than await the 60-day NTSB decision which considers only the merits of those charges--a delay that assuredly will destroy almost any aviation operation.[1]

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[1] The FAA never takes emergency action against large operators, Continental Airlines, for instance. The number of employees is too great, the political fallout would be too intense. The largest we know of was Province-Town Boston Airways with 1200 employees. But FAA rushed two-dozen inspectors in that week-end to

Rather than simply hold 49 U.S.C. § 1429(a) unconstitutional, the Ninth Circuit tried to paste together a fix by noting that FAA orders, pursuant to 49 U.S.C. § 1486, are subject to review by the circuit courts.[2] Since this section gives petitioner a choice between his geographic circuit and the District of Columbia, how would one know whether the latter would honor the former's ruling? The Fourth Circuit? The Tenth? . . . The government does not tell us. Nor do they tell us why this solution went undiscovered for over two decades. No

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recertify the airline. It is well-known their goal was to oust top management. A healthy and decades-old airline, the blow forced PBA into Chapter 11; when rescued by another carrier it was within 24-hours of shutting down for good.

[2] There is no indication in Nevada Airlines that the Ninth Circuit was aware of the strong Congressional mandate in 49 U.S.C. § 1487 to the district courts to afford similar relief, which of course would have provided due process. (Does not this section refute the holding in that case that the district court lacked subject matter jurisdiction?)

legislative history indicates Congress had review of the emergency power in mind when it wrote section 1486.

The government makes no attempt to refute our argument that Nevada Airlines is a case of a court legislating a solution rather than leaving it to Congress. Who initiates the hearing? With a regular TRO it would be the government, but the Ninth Circuit puts the burden on the operator who then must flounder around trying to figure out what it is he must challenge.[3] What is the time limit? That court didn't say, nor does the government tell us how that would be determined without legislation. FRCP

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[3] See Respondent's Memorandum at 4 n. 5. It is silly for the government to suggest petitioner should have anticipated the emergency action and prepared for it. Not only was it five weeks before action was taken, but FAA officials deliberately violated agency rules by not reviewing the claimed discrepancies with management so it could rebut or mitigate them or demonstrate they had instituted procedures to prevent any future repeat.

65(b) does: ten days.

Any judicial TRO must be supported by sworn affidavits from the proponent. Would that be required under the Ninth Circuit's ruling? Now, FAA officials need explain nothing. How would evidence be presented? Would the petitioner be entitled to use the full panoply of discovery procedures? Subpoena FAA inspectors and cross-examine them? We do not know. Circuit courts are patently ill-equipped to conduct such proceedings--unless they appoint a master, usually a district judge or magistrate, thus putting the case right back where it should have been in the first instance. But the Ninth Circuit failed to say, nor does the government explain.

The government tacitly concedes the TRO character of the emergency power and the need for a prompt hearing; its contention is that Nevada Airlines provides the solution. Thus in our view the only issue

before the Court is whether that solution comports with due process. For the reasons given it does not, and cannot.

II. THE APA ISSUES

The issues raised here strictly involve compliance with APA publication and rulemaking requirements. FAA's emergency power and criteria for its use are no different than the Bureau of Indian Affairs' welfare-fund distribution policy at issue in the Court's leading APA case Morton v. Ruiz, 415 U.S. 199 (1974). Putting that policy in an agency handbook was not sufficient. **Notably absent from the government's brief is any discussion of that case. Or explanation of why under the Civil Aeronautics Administration such a rule was appropriate, see 14 C.F.R. § 408.25 (1952), but not under the FAA, the same agency only with a new name and powers for its administrator?**

In Morton the Court pointed out that in

addition to publication agencies must include in a given rule standards and criteria for its use so the public can be assured "it is being applied consistently and so as to avoid both the reality and the appearance" that it is not. 199 U.S. at 231. This of course is what "immediate protection of the public," etc., is all about. See Petitioner's Brief at 30.

The government uses misleading arguments. It contends FAA need not promulgate rules constraining its discretion as to when to employ a particular enforcement action. Respondent's Brief at 5-6. No such issue has been raised by petitioner. The agency has an emergency policy, its contents are not at issue, only agency compliance with the APA. SEC v. Chenery Corp., 332 U.S. 194 (1947), is inapt and obsolete: no APA issue was raised, evidently for the practical reason that act was passed only the year before--1946.

It is anomalous to suggest that use of the emergency power does not adversely affect the business it pre-emptorily shuts down. Donovan v. Wollaston Alloys, Inc., 695 F.2d 1 (1st Cir. 1982), is a weak reed on which to base that argument. Respondent's Brief at 5. Is an emergency shutdown of less concern than an increase in the cost of food stamps? See Anderson v. Butz, 550 F.2d 459 (9th Cir. 1977) (cited in Donovan, 695 F.2d at 10).

Switching the argument from publication of the emergency policy to whether or not the manual in which it may be found should be published is a red-herring. Respondent's Brief at 5. Neither here nor below has petitioner raised any such issue. The policy is the policy is the policy. It could be written on the administrator's shirtcuff, a table napkin; it need not be written at all. Having it spelled out in an agency manual simply makes it easy to show

what it is.

For its failure to publish or promulgate that policy FAA is in violation of the Administrative Procedure Act; that is a complete defense. We remind the Court that this agency, in its 30 years, has never promulgated a single enforcement procedure rule through APA public notice and comment procedures. That is a sad, if not tragic, commentary indeed.

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September 1988